No. 86-421

In The
Supreme Court of the United States
October Term, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, *et al.*,
Appellants,

v.

ROTARY CLUB OF DUARTE, *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLEES' MOTION TO DISMISS OR AFFIRM

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney Gene
*MARIAN M. JOHNSTON
Supervising Deputy
Attorney General
BEVERLY TUCKER
Deputy Attorney General
1515 K Street
Sacramento, California 95814
Telephone: (916) 324-7860
Counsel for Amicus Curiae
State of California

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

STATUTES

TEXTS

No. 86-421

In The

Supreme Court of the United States

October Term, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, *et al.*,

Appellants,

v.

ROTARY CLUB OF DUARTE, *et al.*,

Appellees.

APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLEES' MOTION TO DISMISS OR AFFIRM

INTEREST OF AMICUS CURIAE STATE OF CALIFORNIA

The State of California, by its Attorney General John K. Van de Kamp, respectfully submits this brief as amicus curiae pursuant to Supreme Court Rule 36.4.

Within the federal system, states have long played an essential role in prohibiting discrimination by private enterprises affected with a public interest. In California, this common law doctrine first received statutory recognition in 1897 (Cal. Stats. 1897, ch. 108, § 1, p. 137), and is now codified in the Unruh Civil Rights Act, California

Civil Code § 51 (Cal. Stats. 1959, ch. 1866, § 1, p. 4424). *In re Cox*, 3 Cal.3d 205, 212-214 (1970). Many states, including California, enacted statutes forbidding discrimination by public accommodations in response to the holding in the *Civil Rights Cases*, 109 U.S. 3 (1883), that the federal government had no power to prohibit such private discrimination. *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 33 (1948).

Appellants herein challenge the application of the Unruh Civil Rights Act to prohibit discrimination on the basis of sex by a large association of private clubs and also contend that the Unruh Act is unconstitutionally vague and overbroad. The State of California has a direct and compelling interest in preserving its statute and therefore urges this court to grant appellees' motion to dismiss the appeal, or, in the alternative, to affirm the decision of the court below.

The State of California has a strong interest in preserving the broad interpretation of the Unruh Act expressed in the decision below by the California Court of Appeal. The court's interpretation is consistent with the common law of California and with the legislative decision to codify the common law. Furthermore, the State of California, as expressed in Article I, § 8 of the California Constitution[1] has a strong public policy of ensuring that business opportunities are not denied on the basis of sex.

---

[1]Article I, § 8 of the California Constitution provides "a person may not be disqualified from entering or pursuing a business, profession, vocation or employment because of sex, race, creed, color, or national or ethnic origin."

STATEMENT OF THE CASE

In 1977, the Rotary Club of Duarte (Duarte) admitted three women as members. Rotary International then revoked Duarte's charter as a local Rotary Club and terminated its membership in Rotary International, claiming that Duarte had violated its obligation to abide by the rules of Rotary International. These rules require local Rotary Clubs to limit membership to men.

Duarte, together with two of its women members, sued Rotary International for injunctive and declaratory relief, seeking to enjoin Rotary International from revoking Duarte's charter and from enforcing the male-only membership rule, and seeking a declaration that the male-only rule violated the Unruh Civil Rights Act, California Civil Code section 51, and Article 1, § 8 of the California Constitution.

The Los Angeles County Superior Court ruled in favor of Rotary International finding that it had not violated the Unruh Act. The Court of Appeal reversed, concluding that Rotary International was a business establishment within the meaning of the Unruh Act and thus was prohibited from discriminating on the basis of sex.

The Court of Appeal denied Rotary International's petition for rehearing and the California Supreme Court denied its petition for review.

———o———

SUMMARY OF ARGUMENT

This case does not present a substantial federal question. It involves issues that were decided by this Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and presents no facts that would distinguish it from the rule of that case.

Rotary International is not the type of organization whose members, according to *Roberts*, may assert first amendment rights of intimate and expressive association. Indeed Rotary International has no human members as it is an association of membership clubs. Based on this fact and its substantial business-like attributes, the state Court below, consistent with *Roberts*, found that Rotary International could not insulate its policy of discriminating on the basis of sex in membership from operation of the Unruh Civil Rights Act which prohibits such discrimination. The court also concluded, consistent with *Roberts*, that any first amendment rights of Rotary International were outweighed by California's compelling state interest in eliminating discrimination on the basis of sex which might impede the female citizens of the state in pursuing a business or profession.

Rotary International may not raise the question of whether the Unruh Act is unconstitutionally vague or overbroad in this Court as it failed to timely raise the issue in the state court. Rotary International may not assert that the Unruh Act is unconstitutionally vague because the statute is not vague as applied to it. Finally, the Unruh Act is not unconstitutionally overbroad.

ARGUMENT

I. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. Rotary International Cannot Assert a Constitutional Right of Intimate Association.

This case presents issues already decided by this Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). That decision held that the constitution protects freedom of association in two forms—freedom of intimate association and freedom of expressive association. 468 U.S. at 617-618. According to the court, "certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme" (468 U.S. at 617-618) and the Constitution guarantees a right to associate for the purpose of engaging in activities protected by the first amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. However, the court upheld application of the Minnesota public accommodations statute which prohibited the Jaycees from denying full membership to women because the Jaycees was not an organization which could assert a constitutional right of intimate association and Minnesota's compelling interest in prohibiting discrimination against its female citizens justified any impact on the Jaycees' freedom of expressive association.

The decision of the California Court of Appeal below is consistent with this Court's decision in *Roberts* and merely involve application of the principles in *Roberts* to

a slightly different factual setting. In *Roberts* this Court determined that local chapters of the Jaycees were large and unselective groups which permitted strangers to participate in their activities and therefore could not assert a constitutional right of intimate association to justify their exclusion of women from full membership.

Similarly, the court below determined that Rotary International exhibited "substantial businesslike-attributes" and was therefore subject to the Unruh Civil Rights Act which prohibits discrimination on the basis of sex by "all business establishments of any kind whatsoever." App. C-17-22. Rotary International is a nonprofit corporation which has no human members, but is comprised of 19,788 local clubs which together have approximately 907,750 members. App. C-5. Membership in local clubs is limited to business and professional *men*. App. C-6. The average size of a local club is 50 members but clubs range in size from 20 to 900 members. App. G-60. Meetings of local clubs are generally held in public hotels and members may invite male non-members to attend meetings. App. G-25.

Rotary International publishes a magazine to which each local club member must subscribe, licenses private firms to use its emblem on manufactured goods and collects royalties from the sale of those goods, and publishes a directory listing the licensed firms. App. C-20-22. Based on these facts, the court below concluded that Rotary International has sufficient business-like attributes

to render it a business establishment within the meaning of the Unruh Act.

The court also noted that "there are substantial business benefits to be gained by belonging to an organization such as Rotary which is comprised of community business and professional leaders." App. C-22. Because Rotary International has provided a forum which encourages business relations to grow and enhances the commercial advantages of its members it and Duarte were found to be business establishments within the meaning of the Unruh Act. App. C-27.

Necessarily, a conclusion that an organization is a business within the meaning of the Unruh Act entails a conclusion that it is not the sort of organization which may assert a constitutional right of intimate association. Of course, Rotary International has no human members and thus, cannot assert any such right. Duarte, based on the criteria outlined by this Court in *Roberts,* arguably could[2] but it does not complain that its rights of association are violated by application of the Unruh Act. It voluntarily chose to admit women and was punished by International Rotary for doing so.

---

[2]In *Roberts* this Court noted that attributes such as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation ,and seclusion from others in critical aspects of the relationship might give rise to a constitutional right of freedom of intimate association but that "[c]onversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection." 468 U.S. at 620.

B. Constitutional Guarantees Do Not Protect Private Discrimination.

Although the Constitution does recognize rights of intimate and expressive association, these constitutional guarantees have never been held to include an affirmative right to discriminate.

To the contrary, this Court has held on numerous occasions that private discrimination is unworthy of constitutional protection. This issue was first addressed by the Court in the context of discrimination by labor organizations. In *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945) this Court upheld the application of New York's fair employment law to such an organization, rejecting the defense that such discrimination was protected against state interference by the fourteenth amendment. This Court's refusal to extend constitutional protection to private discrimination continued in *Norwood v. Harrison*, 413 U.S. 455 (1973) where this Court affirmed that a state may not loan textbooks to a segregated school, saying:

> "[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Id.*, at 469-70.

Similarly, in *Runyon v. McCrary*, 427 U.S. 60, 176 (1976), holding that 42 U.S.C. § 1981 prohibits private schools from denying admission on the basis of race, this Court quoted the language cited above in *Norwood v. Harrison* and distinguished between the protected First

Amendment right to advocate segregated schools, and the asserted right to exclude students on the basis of race, rejecting the latter.

This issue was addressed most recently in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), where this Court upheld the application of Title VII to the partnership decisions of a law firm, rejecting the claim that regulation of the firm's employment practices violated constitutional guarantees. If any constitutional restrictions applied to the regulation of relationships which "touch or concern" rights of privacy or association, these restrictions would certainly be at their peak as to the intimate choice of partners in a law firm. Rotary International has no claim of an intimate relationship with the more than 900,000 local club members from whom it receives dues payments, and thus the Constitution does not protect its desire to discriminate on the basis of sex in membership.

While a constitutionally protected "zone of privacy" protecting private discrimination has been discussed by some members of the Supreme Court (see *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) and *Moose Lodge No. 7 v. Irvis*, 407 U.S. 163, 179-180 (1972) (Douglas, J., dissenting)), this proposition has never been applied by this Court to approve discriminatory practices. Indeed, this Court has consistently refused to interfere with state regulation of private discrimination.

Other state courts have held that private clubs may not discriminate in violation of state public accommodation statutes. *See*, e.g., *Commonwealth of Pennsylvania, Human Relations Commission v. Loyal Order of Moose*,

Lodge No. 107, 448 Pa. 451, 294 A.2d 594 (1972), appeal dismissed for want of a substantial federal question, 409 U.S. 1052 (1972), in which the same club discussed in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, was held subject to a state civil rights law; *B.P.O.E. Lodge No. 2043 of Brunswick v. Ingraham*, 297 A.2d 607, 614-615 (Me. 1972), appeal dismissed for want of a substantial federal question, 410 U.S. 903 (1972), in which the power of a state to regulate discrimination by a private club was again upheld; and, Note, *Section 1981 and the Thirteenth Amendment after Runyon v. McCrary*, 29 Stan. L. Rev. 747, 759 (1977) ("[P]rivate clubs cannot successfully claim either the right of association or the right to privacy.").

Since assertions of constitutional protection for discriminatory membership and guest policies of truly private clubs have been rejected, there is certainly no such protection for Rotary International, an association of clubs which itself has no human members.

C. If Any Constitutional Rights are Infringed, California has a Compelling Interest which Justifies Such Infringement.

Assuming any constitutional rights are infringed by a state's prohibition of discriminatory membership practices, the validity of the state's action can only be determined after the state's interest is balanced against the nature and degree of the intrusion. As described in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), the analytical process the court must employ is to identify, evaluate and weigh the countervailing interests. As this Court concluded in *Roberts:*

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms. [Citations omitted.] 468 U.S. at 623.

Public policy in California strongly favors elimination of discrimination based on sex. *Koire v. Metro Car Wash,* 40 Cal.3d at 36-37. The Unruh Act expressly prohibits sex discrimination by business enterprises and has been applied to invalidate policies that discriminate on the bases of sex and public accommodations. *Isbister v. Boys' Club of Santa Cruz, Inc.,* 40 Cal.3d 72 (1985).

As recognized in a landmark decision by the California Supreme Court, which led the nation in establishing that discrimination on the basis of sex is subject to the most rigorous scrutiny, "sex alone may not be used to bar a person from a vocation, profession or business." *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 8. The court further stated: "[T]he right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness." 5 Cal.3d at 17. The court below extended this concern to include the discriminatory policies of an association which

could impede women in achieving success in a business or profession.

Discrimination by membership organizations comprised of influential business and professional men has been criticized in numerous commentaries as one of the final hurdles barring the equal opportunity of all persons to develop their talents and thus benefit society.

> Because prestigious clubs exert an enormous influence on our country's commercial and political life, the national commitment to equality of opportunity must override asserted interests in privacy and association. Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C.R.—C.L.L. Rev. 321, 324 (1983).

As the same writer concluded.

> [W]hen a private club, whose members are highly influential in government, business and the professions, flatly denies membership to an entire class of persons . . . our nation ultimately suffers. Denying women the right to associate in this context inhibits their professional advancement, and, in turn, restricts their contribution to society." *Id.*, at 407.

See also Goodwin, *Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door*, 13 Sw. U. L. Rev. 237, 271 (1982); and Hollingsworth, *Sex Discrimination in Private Clubs*, 29 Hastings L. J. 417, 442 (1977).

Given the substantial detriment discriminatory membership policies cause both to the excluded group and to society as a whole, the elimination of such discrimination is certainly a compelling state interest. This is particularly true of a service organization such as Rotary Inter-

national, an organization of local clubs whose more than 900,000 members are influential business and professional men.

Measured against this substantial concern for equal opportunity for all, Rotary International's interest in maintaining its male-only membership appears insubstantial. While some of the organization's activities may be protected under the Constitution, there is absolutely no showing that the male-only policy is necessary for, or even related to the pursuit of those activities. Significantly, Rotary International does not claim that expressive activity is a major aspect of its purpose and function, so it cannot claim that its right to expression would be infringed if Duarte admits women as members.

On balance, the state's concern for promoting equal opportunity for all persons, for the benefit of both the individual and society as a whole, vastly outweighs any legitimate interest of Rotary International in maintaining a discriminatory membership policy.

II. INTERNATIONAL ROTARY MAY NOT CLAIM THAT THE UNRUH ACT IS VAGUE OR OVERBROAD.

A. This Court Will Not Hear an Issue Not Raised in the State Courts Below.

28 U.S.C. § 1257 which governs the jurisdiction of this Court "requires that in the state court petitioners have specially set up or claimed under the Constitution of the United States that right which they now seek to have this Court enforce." This Court has repeatedly refused to

consider a federal question which was not presented to the state courts below. *Webb v. Webb,* 451 U.S. 493, 495 (1981); *Cardinale v. State of Louisiana,* 394 U.S. 437, 438 (1969).

Rotary International never asserted that the Unruh Act was unconstitutionally vague or overbroad in the state courts. It did make an argument based on "uncertainty" in its petition for rehearing in the California Court of Appeal but under California law this issue was not timely raised (Rule 29 (b)(1), California Rules of Court). This Court will not hear a question that was not *timely* raised under state law. *Exxon Corp v. Eagerton,* 462 U.S. 176, 181 n.3 (1983); *Bailey v. Anderson,* 326 U.S. 203, 205-207.

B. The Unruh Act is Not Vague as Applied to Rotary International.

Under the void for vagueness doctrine "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy,* 417 U.S. 733, 756 (1974). The Unruh Act expressly prohibits discrimination on the basis of sex. Rotary International sought to require Duarte to discriminate on the basis of sex, thus Rotary International cannot claim that the Unruh Act is vague as applied to it.

C. The Unruh Act is Not Unconstitutionally Overbroad.

Appellants argue that the Unruh Act is unconstitutionally overbroad because it has a chilling effect on the first amendment associational rights of all groups in California which are not open to the general public. This Court need not consider this claim.

This Court has applied the overbreadth doctrine "sparingly and only as a last resort" to strike down statutes which on their face may chill first amendment rights. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). This Court has stated its reluctance to strike down a statute on its face where it may be validly applied. Thus, in *Parker v. Levy*, 417 U.S. 734, where appellant's actions fell within the questioned statute, this Court declined to find it overbroad stating:

> ". . . Thus even if there are marginal applications in which a statute would infringe on first amendment values, facial invalidation is inappropriate if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribed conduct. . . ." 417 U.S. at 760.

California courts have not interpreted the Unruh Act so as to chill the first amendment rights of intimate association and expressive association recognized by this Court in *Roberts*. Clearly the Unruh Act's prohibition of arbitrary discrimination against defined classes of persons does not aim at suppressing first amendment rights. In *Roberts* this Court rejected the suggestion that discriminatory membership policies are themselves "symbolic speech" subject to first amendment protection. 609 U.S. at 627.

In *Roberts* the Jaycees argued that the Minnesota public accommodations statute was unconstitutionally vague and overbroad. Like the Unruh Act at issue herein the Minnesota statute prohibited discrimination by a "business". 468 U.S. at 615. The Minnesota Supreme Court concluded that the Jaycees was a business because it sold goods and extended privileges in exchange for annual membership dues. 468 U.S. at 616. This Court held that the

Minnesota Act, as interpreted by its highest court, was not unconstitutionally vague and overbroad because "the Minnesota Supreme Court used a number of specific and objective criteria—regarding the organization's size, selectivity, commercial nature, and use of public facilities—typically employed in determining the applicability of state and federal antidiscrimination statutes to the membership policies of assertedly private clubs." 468 U.S. 629.

California courts have applied just such specific and objective criteria in determining that various organizations, including Rotary International, are subject to the Unruh Act's prohibition of arbitrary discrimination. In *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, the California Supreme Court held that the Unruh Act prohibited the Boys' Club from discriminating on the basis of sex because it provided an atmosphere deemed characteristic of a public accommodation, and members lacked a sense of "social cohesiveness, shared identity, or continuity". 40 Cal.3d at 81-82. Similarly, in *Curran v. Mount Diablo Council of the Boy Scouts,* 147 Cal.App.3d 712 (1983), app. dism., 104 S.Ct. 3574 (1984), the court held that the Boy Scouts were subject to the Unruh Act because it, like the Boys' Club, offered its facilities and membership to the general public. In addition to focusing on the public availability of membership and facilities, California courts have also held the Unruh Act to be applicable to organizations with commercial or businesslike attributes. *Marina Point, Ltd. v. Wolfson,* 30 Cal.3d 721 (large apartment complex); *O'Connor v. Village Green Owners Assoc.,* 33 Cal.3d 790, 795 (1983) (Condominium owners' association which performed the customary functions of a landlord).

Thus, it can easily be discerned that the prohibitions of the Unruh Act will apply to just the sort of organizations described by this Court in *Roberts* as not being in the class of organizations whose rights of intimate and expressive association are protected by the first amendment and there is no risk that it will be applied "to a substantial amount of protected conduct." 609 U.S. at 631. Even if it is established that some clubs not open to the general public are subject to the Unruh Act, it does not follow that every private club will be. Those clubs which are truly intimate and personal and which have few or no commercial attributes are not subject to the Unruh Act and may continue to set such membership policies as they choose. Those whose major purpose is expressive activity subject to first amendment protection may set membership policies which are rationally related to their expressive activities. Under California court interpretations of the Unruh Act, the small group of intimate friends who gather to play poker have no fear that their right to freely and intimately associate will be disturbed by the long arm of the state even if they derive incidental business and professional benefits from their association.

———o———

CONCLUSION

For the foregoing reasons, the State of California urges this Court to grant appellees' motion to dismiss the appeal or, in the alternative, to affirm the decision below.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
*MARIAN M. JOHNSTON
Supervising Deputy
Attorney General
BEVERLY TUCKER
Deputy Attorney General
1515 K Street
Sacramento, California 95814
Telephone: (916) 324-7860

Counsel for Amicus Curiae
State of California

*Counsel of Record